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Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

CC 97-90

In the Matter of Requests of U S West Communications, Inc. for Interconnection Cost Adjustment Mechanisms	)	CCB/CPD 97-12

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COMMENTS OF ICG TELECOM GROUP, INC.

ICG Telecom Group, Inc. ("ICG"), a subsidiary of ICG Communications, Inc., hereby files its comments on the Petition for Declaratory Ruling and Contingent Petition for Preemption filed on February 20, 1997 (the "CLEC Petition") by Electric Lightwave, Inc., McLeodusa Telecommunications Services, Inc., and Nextlink Communications, L.L.C. (collectively, the "CLEC Petitioners"). ICG supports the CLEC Petitioners' request for a Commission ruling that U S West Communications, Inc. ("U S West") cannot recover its "network rearrangement costs" through state-imposed surcharges on its potential competitors or its customers. As shown below, U S West's request that it be permitted to levy a prohibitive competition fee on new entrants seeking access to its network is anticompetitive and discriminatory and flies in the face of the principles of the Telecommunications Act of 1996. Permitting U S West to isolate its alleged network rearrangement costs from its other costs and impose them on its customers as a direct surcharge is also unacceptable. Instead, those costs -- like any others -- are properly recoverable through general rate cases filed in each of the states where U S West believes its total recovery is not adequate.

STATEMENT OF INTEREST

ICG is based in Denver, Colorado and is the third largest facilities-based competitive local exchange carrier ("CLEC") in the United States. ICG operates networks in thirty-four cities with populations in excess of 100,000, has recently acquired fiber optic facilities in twenty-five cities, and has networks under construction in several additional cities. ICG is authorized to conduct business in Colorado and has concluded an arbitrated interconnection agreement with U S West there.

INTRODUCTION AND SUMMARY

In petitions filed in all fourteen states within its territory, U S West has asked the various state public utilities commissions to allow U S West to impose what it terms "Interconnection Cost Adjustment Mechanism," or "ICAM," surcharges on its competitors to recover the costs of the start-up network rearrangements that U S West claims are necessary to provide requesting CLECs with access to its network.[1]

1 U S West identified three general categories of network rearrangements: (1) (Footnote continued)

Alternatively, U S West proposes that the ICAM be assessed directly on end users in the form of a monthly surcharge.

As the CLEC Petition makes clear, neither result is justifiable. Imposing an ICAM surcharge on U S West's CLEC competitors would violate the pro-competitive principles of the Telecommunications Act of 1996 (the "1996 Act") and the Commission's implementing rules for two reasons. First, Section 252(b) of the Communications Act of 1934, as amended (the "Act") and the Commission's implementing rules make clear that costs in excess of the forward-looking cost of a providing a particular service to a CLEC cannot be imposed on requesting carriers.[2] Second, an ICAM surcharge imposed on U S West's competitors would violate the principle of competitively neutral cost recovery and would be discriminatory because new entrants would be subject to the surcharge, but U S West, their entrenched competitor, would not. U S West estimates that the costs it seeks to recover through the ICAM surcharge will total between $500 million and $1 billion over the next three years.[3] And these costs will rise if, as it has said it will, U S West adds additional categories of costs to those it seeks to include in the ICAM surcharge. If CLECs

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(Footnote continued)
software changes to enable it to service requesting CLECs; (2) expansion of network capacity in its tandems and interoffice facilities in order to accommodate anticipated CLEC traffic demands; and (3) establishment of service centers to process CLEC service orders. See U S West's Petition for Declaratory Ruling and Request for Agency Action, filed January 3, 1997 before the Public Service Commission of Utah, at 2-3 ("U S West Utah Petition"), a copy of which is attached to the CLEC Petition. U S West also reserved the right to add additional cost categories as it saw fit. Id. at 9.

[2] 47 U.S.C. § 252(d).

[3] U S West Utah Petition at 3.

are forced to bear those costs, the CLECs already in U S West's market will be at a competitive disadvantage and others may be deterred from entering the market.

Imposing the costs as a surcharge on end users is also unacceptable. There is no basis for separating out U S West's alleged network rearrangement costs from its other costs. Instead, the costs are properly part of U S West's overall revenue requirement and should be recovered through standard ratemaking cases as a component of U S West's general rates, where there can be an overall evaluation of U S West's recovery of its total costs.

DISCUSSION

I. U S WEST IS NOT ENTITLED TO RECOVER ITS ALLEGED NETWORK REARRANGEMENT COSTS FROM CLECS UNDER SECTION 252

Section 252(d) establishes pricing standards for interconnection, access to unbundled network elements, and resale (referred to herein collectively as "Competitors' Services").[4] Section 252(d) requires that the pricing of Competitors' Services be "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element."[5] U S West's alleged start-up costs of rearranging and upgrading its network to prepare generally for new

4 47 U.S.C. § 252(d).

5 Id.

entrants are excluded from recovery from requesting carriers under Section 252(d)'s pricing standard and the Commission's implementing rules.

U S West itself recognizes that neither Section 252(d) in particular nor the 1996 Act generally contains any mechanism for paying for underlying network rearrangements necessary to open incumbent local exchange carrier ("ILEC") networks to competition.[6] From this fact, however, U S West draws completely the wrong conclusion. That Section 252(d) does not provide for the recovery of those costs from CLECs makes clear that they are to be recovered elsewhere, not that state regulators should impose the costs on CLECs where Congress chose not to do so.

As the CLEC Petitioners point out, in establishing the allowable cost recovery under Section 252(d) Congress struck a balance between, on the one hand, allowing ILECs a reasonable recovery of their costs directly attributable to providing a requesting carrier with access to the ILECs' networks and, on the other hand, not deterring new entrants from competing. By excluding network rearrangement costs from the pricing standard of Section 252(d), Congress made clear that new entrants should not be required to pay those costs. State-imposed ICAM surcharges on CLECs would, in effect, represent an end-run around that Congressional policy determination.

The Commission's Interconnection First Report and Order[7] and the rules adopted therein make clear that network rearrangement costs are not covered by Section

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6 See U S West Utah Petition at 2.

7 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 1549 (1996) ("Interconnection First Report and Order").

252(d). The "total element long-run incremental cost," or "TELRIC," methodology adopted by the Commission provides for the recovery of only an ILEC's forward-looking economic costs of providing Competitors' Services from requesting carriers. Those costs, as defined by the Commission's TELRIC model, do not provide for the recovery of the extraordinary one-time network rearrangement costs that U S West seeks to recover.

II. U S WEST'S PROPOSED ICAM SURCHARGE ON CLECS IS NOT COMPETITIVELY NEUTRAL AND IS THUS INCONSISTENT WITH THE PRINCIPLES OF THE 1996 ACT

A. Any Cost Recovery Mechanism Must Be Competitively Neutral Under the 1996 Act

The first principle in addressing the question of U S West's recovery of its network rearrangement costs -- to the extent that they are recoverable at all -- must be competitive neutrality. As has often been noted, the 1996 Act is pro-competition, not pro-competitor. The Commission stated in its Interconnection First Report and Order:

> Congress recognized in the 1996 Act that access to the incumbent LECs' bottleneck facilities is critical to making meaningful competition possible. As a result of the availability to competitors of the incumbent LECs' unbundled elements at their economic cost, consumers will be able to reap the benefits of the incumbent LECs' economies of scale and scope, as well as the benefits of competition.

Id. ¶ 679. What is true for unbundled elements is equally true for interconnection and resale.

To the extent that U S West is entitled to recover its network rearrangement costs, it cannot do so by imposing them on its competitors. If new entrants are forced to bear the costs of opening U S West's network up to competition, then the likelihood of realizing the benefits of competition in U S West's fourteen states is greatly diminished because existing competitors like the CLEC Petitioners and ICG will be at a competitive disadvantage and potential competitors may be deterred from entering U S West's market. Therefore, any cost recovery mechanism must be competitively neutral as between U S West and its new entrant competitors.

The CLEC Petitioners point out correctly that Section 253 of the Act also requires that any state-imposed cost recovery mechanism must be competitively neutral.[8] Section 253(a) prohibits any state or local authority from erecting any barrier to entry to the interstate or intrastate telecommunications market.[9] While Section 253(b) makes clear that states retain the authority to impose "requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers," they must do so on a "competitively neutral basis."[10] Thus, to the extent that Section 253(a) does not completely foreclose the erection of what is a clear barrier to entry, it, at the very least, requires that any state that provides for the recovery of U S West's costs must do so in a way that is competitively neutral.

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8 See CLEC Petition at 11.

9 47 U.S.C. § 253(a).

10 47 U.S.C. § 253(b).

The Commission has addressed, at considerable length, "competitively neutral" cost recovery principles in its number portability proceeding.[11] There, the Commission held that in order for cost recovery to be competitively neutral, "the cost . . . borne by each carrier [must] not affect significantly any carrier's ability to compete with other carriers for customers in the marketplace."[12]

The Commission established two criteria that any competitively neutral cost recovery mechanism must meet. First, the cost recovery "should not give one service provider an appreciable, incremental cost advantage over another service provider, when competing for a specific subscriber."[13] In other words, cost recovery cannot put a new entrant at "appreciable cost disadvantage relative to any other carrier that could serve" a given customer, including in particular the ILEC currently serving the customer.[14]

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[11] Telephone Number Portability, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352 (1996) ("Number Portability Order"). The Commission found that competitively neutral cost recovery for number portability is appropriate because "number portability is a network function that is required for a carrier to compete with the carrier that is already serving a customer" and, therefore, that to "price number portability on a cost causative basis could defeat the purpose for which it was mandated." Id. ¶ 131. Similarly, requiring new entrants to bear the full cost of the network rearrangements necessary to provide them with access to U S West's network would defeat the purpose of requiring U S West to afford them the access in the first place. While the Commission noted in the Number Portability Order that the principle of competitively neutral cost recovery was a departure from the Commission's usual practice of following "cost causation principles," id., the rationale for the departure cited by the Commission in that context is equally applicable here. And even under a cost-causer analysis, the real cost-causers here are all users of the public network because they are the ultimate beneficiaries of increased competition.

[12] Id.

[13] Id. ¶ 132.

[14] Id.

The second criterion identified by the Commission for competitively neutral cost recovery is that it "should not have a disparate effect on the ability of competing service providers to earn normal returns on their investment."[15] For example, a cost recovery mechanism is not competitively neutral if it imposes costs on a new entrant that are so large relative to expected profits that the new entrant could be deterred from entering the market.[16]

The Commission made clear that imposing the costs of number portability solely on new entrants -- through a surcharge or otherwise -- would fail under the above test.[17] The Commission found that "surcharges would not meet the first criterion for 'competitive neutrality' because a new facilities-based carrier would be placed at an appreciable, incremental cost disadvantage relative to another service provider, when competing for the same customer."[18] With respect to the second criterion, the Commission found that new entrants "may be effectively precluded from entering the local exchange market if they are required to bear all the costs of currently available number portability measures."[19]

B. Imposing an ICAM Surcharge on New Entrants Would Not Be Competitively Neutral

U S West's proposal that it should be permitted to recover its alleged network rearrangement costs in excess of those provided for by TELRIC pricing directly from its competitors is anything but competitively neutral. In fact, it would be highly

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15 Id. ¶ 135.

16 Id.

17 Id. ¶ 138.

18 Id.

19 Id.

discriminatory: it would impose on each of U S West's competitors what amounts to any entry fee for the right to compete with U S West. Only U S West itself would not be subject to the fee.

The ICAM surcharge on CLECs would thus fail both prongs of the Commission's test for competitively neutral price recovery. First, the ICAM surcharge would give U S West "an appreciable, incremental cost advantage" over CLECs "when competing for a specific subscriber."[20] If CLECs seeking to compete with U S West are subject to a competition fee that U S West itself is not required to bear, then the CLECs, all other things being equal, would be forced to charge their customers higher prices. The ultimate losers will be consumers, who will not receive the new services at lower rates that companies like ICG are trying to deliver.

Second, U S West's proposed ICAM surcharge on CLECs would have a "disparate effect on the ability of competing [CLECs] to earn normal returns on their investment."[21] U S West estimates the costs that it seeks to recover are at least $500 million to $1 billion over the next three years. That amount, even spread over several CLECs, may be so large relative to expected profits that the new entrants would be dissuaded from entering the market.[22] Any recovery of U S West's network rearrangement costs cannot come at the expense of the new entrants to whose competition U S West is supposedly opening itself.

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20 Id. ¶ 132.

21 Id. ¶ 135.

22 Indeed, the amount that U S West seeks to recover exceeds ICG's annual gross revenue.

III. U S WEST MUST RECOVER ITS COSTS NOT CAPTURED IN SECTION 252(d) THROUGH GENERAL RATEMAKING CASES, SUBJECT TO GENERAL RATEMAKING PRINCIPLES

Section 252(d) specifies what portion of the costs of providing Competitors' Services to new entrants are recoverable directly from the new entrants. The costs in excess of those recovered under Section 252(d)'s pricing standard, if any, must be recovered in the same manner as any other costs -- as part of the general revenue requirement established in a general rate case.

Except in a very few narrow instances where there is an explicitly mandated federal or state charge, such as the federal EUCL charges or state E911 charges, rates are not set incrementally in response to a new cost. Instead, all costs are included in general rates. There is no basis for U S West's request that it be permitted to foist its alleged network rearrangement costs either on its competitors or on end users generally as a direct surcharge.

U S West should not be allowed to sidestep the ratemaking process by isolating what it claims are new costs and then obtaining incremental recovery of those costs without having its overall cost recovery examined. If U S West believes its total recovery in a given state is inadequate, then it bears the burden of making that showing before that state's public utility commission. If the state PUC agrees that U S West's total recovery is not adequate, then an adjustment in U S West's overall rates may be appropriate.

Even U S West appears to concede that state ratemaking cases are the proper vehicles for recovery of its alleged network rearrangement costs. Though the admission is buried in a footnote, U S West says that it "intends to raise this issue [of cost recovery] in its upcoming general rate case filing, to the extent recovery of these costs is not provided for in response to the instant request for agency action or in individual arbitrated or negotiated agreements."[23] While U S West asserts that, in the past, the ratemaking process has not provided for the recovery of certain one-time costs and there is "therefore no certainty that [U S West] could have rates made"[24] to include recovery of its network rearrangement costs, it offers no explanation of why this would be so. In fact, there is no reason that U S West cannot fully recover its alleged network rearrangement costs in a general rate case. If U S West believes that sufficient overall cost recovery is not granted or recovery for a specific cost is wrongfully denied, U S West can pursue its remedies through the appropriate forum.

CONCLUSION

U S West's filing of ICAM petitions in each of its fourteen states should be seen for what it really is: an attempt to delay the advent of local competition by making competitive entry as onerous as possible. In this regard, ICG joins the CLEC Petitioners in calling attention to the fact that in each of its fourteen separate petitions, U S West actually "reserves the right" not to provide new entrants with Competitors' Services -- despite its

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23 U S West Utah Petition at 5-6 n.2.

24 Id. at 5.

statutory obligation to do so -- if it does not get its way with respect to the proposed ICAM surcharge. For example, in its Utah Petition, U S West states:

> As evidence of its good faith and commitment to competition, USWC will continue to incur the foregoing costs and make needed network rearrangements while this Request is pending before the Commission. If the Commission does not undertake expeditious treatment of this Request, [U S West] reserves the right to re-evaluate the appropriateness of further expenditures, after notice to the Commission.

U S West Utah Petition at 9.

The anticompetitive nature of U S West's threats underscores the need for prompt Commission action. The Commission should therefore expeditiously grant the CLEC Petition and issue a declaratory ruling that:

1. To the extent that U S West has any costs of providing Competitors' Services not recoverable under Section 252(d), those costs are not recoverable as a surcharge on its competitors because such recovery would be inconsistent with the 1996 Act and would not be competitively neutral.

2. The appropriate relief, if any, is for U S West to institute a general rate case in each state where it believes that its costs are not being adequately recovered.

3. Any rate case filed by U S West must be governed by general ratemaking principles. In particular, any cost recovery should come in the form of an adjustment to U S West's general rates, not as a surcharge on its competitors or on end users.

4. U S West must continue to fulfill its statutory obligations under the 1996 Act to provide access to its network to new entrants.

Dated: April 3, 1997

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 3, 1997, I caused a copy of the foregoing "Comments of ICG Telecom Group, Inc." to be sent by first class United States mail to the following:

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